IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1054 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LALABHAI PARKABHAI HARIJAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1054 of 1995

MR US BRAHMBHATT for Petitioner No. 1

MR K P Rawal, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 11/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

The appellant above named, has preferred this appeal under sub-section (2) of section 374 of the Code of Criminal Procedure, 1973 (for short, 'the Code') in order to challenge the judgment and conviction order dated 21.10.1995 recorded by the learned Addl.Sessions Judge, Banaskantha at Palanpur in Sessions Case No.11//94 convicting the present appellant for an offence punishable under section 302 of IPC and sentencing him to suffer R.I. for life and imposing fine of Rs. 7,000/-. In default of payment of fine, the appellant was directed to undergo imprisonment for a further period of six months.

2. At the same time, the trial court acquitted the present appellant for offence punishable under section 504 of IPC and also under section 37(1) read with section 135 of the Bombay Police Act. The facts of the case of the prosecution may be briefly stated as follows:

The appellant has got his field in village Runi in Deodar Taluka, Banaskantha district. The deceased had his own field on the western side of the field of the appellant. It is also not much in dispute that on the eastern side of the field of the appellant, there is a field belonging to the father of the deceased. This would mean that the fields of the father and the son are on both the sides of the field of the appellant and the field of the appellant is in between the fields of the deceased and his father.

3. It appears that on 21.10.1993 at about 11.30 a.m. the deceased was constructing or renovating field channel for the passage of water from the field of his father to his own field. The said field channel was constructed or reconstructed through the field of the appellant. When the appellant was moving in his field, he saw the deceased aged about 25 years, constructing field channel passing through the field of the appellant. The appellant was therefore, annoyed by the said act of the deceased and therefore, he asked the deceased not to construct the field channel through his field. He also told him that it was a land meant for the passage and, therefore, field channel should not have been constructed through his field. In the process, there was some exchange of hot words and filthy language was also exchanged between the two. At that time, according to the case of the prosecution, the present appellant dealt one dharia blow on the head of the deceased and another dharia blow on the neck of the deceased. With the result, the deceased fell down on the ground. The

appellant ran away from the said place. Thereafter the deceased was taken to the hospital. One Ruda Nagjibhai Exh.11 filed his FIR. Since the deceased died, inquest report was prepared. Investigation was undertaken, the appellant was arrested, panchnama of the scene of offence was also drawn. The appellant had discovered muddamal dharia and it was therefore, seized by the Investigating Police Agency. At the end of the investigation, charge sheet was filed before the Court concerned.

4. Since the offence punishable under section 302 of IPC was exclusively triable by the Court of Sessions, the learned Magistrate had committed the case to the Court of Sessions and there it was registered as Sessions Case no.11/94. The learned trial Judge provided the appellant with copies of police investigation papers. Charge at Exh.3 was prepared and framed against the appellant. It was read over and explained to the appellant. The appellant pleaded not guilty to the said charge and, therefore, evidence was recorded. At the close of the evidence, further statement of the appellant was also recorded under section 313 of the Code. There the appellant claimed that the entire evidence led against him was false and he did not want to say anything further. The appellant did not show his willingness to lead defence. Thereafter, the learned trial Judge heard the arguments of the learned Advocates for the parties and pronounced the aforesaid judgment holding the appellant guilty of the aforesaid offence and, therefore, after hearing the appellant on the quantum of punishment, inflicted the aforesaid punishment on the appellant.

5. Feeling aggrieved by the aforesaid judgment and conviction order passed by the trial court, the appellant has preferred this appeal before this court. The appellant has contended here that the witnesses examined by the prosecution have actually not seen the incident and all the four eye witnesses have been 'got up' by the prosecution. It is also contended that the fact of discovery of muddamal dharia has also been fabricated against the present appellant. That though the evidence on record disclosed that the deceased was constructing a new field channel through the land of the appellant, that aspect has not been properly considered by the trial court. That the trial court has also not considered the fact that the deceased possessed a spade with him and, therefore, the appellant had a reasonable apprehension that the deceased would hit him with the said spade. The question of right of private defence has not been properly appreciated by the trial court. That on the whole, the judgment and conviction order of the trial

court are illegal and erroneous and deserve to be set aside. The appellant has, therefore, prayed that the present appeal be allowed, the judgment and the conviction order be set aside, the appellant be acquitted of the aforesaid offence and he may be set at liberty forthwith.

6. On receipt of the appeal, it was ordered to be admitted. However, bail was refused. Thereafter, the matter has come up at the stage of final hearing.

Initially Ms Shilpa J Unwala, learned Advocate was appointed to present the case of the appellant but on account of her sickness, she returned the papers to the office and thereafter, Mr U S Brahmbhatt, learned Advocate has been appointed to plead the case of the appellant before the Court. On the other hand, the State was represented by Mr K P Rawal, learned APP. We have heard the arguments advanced by Mr Brahmbhatt and Mr Raval extensively. They have argued the matter at length. They have also taken us through the evidence on record and the observations of the trial court during the course of the judgment.

7. It is not much in dispute that as per the case of the prosecution, on 21.10.1993 at about 11.30 a.m. the appellant was moving in his field. At that time, the deceased was constructing/reconstructing field channel through the field of the appellant so as to take water from the field of his father to his own field. It is not much in dispute that the field of the father of the deceased is on the eastern side of the field of the appellant and the field of the deceased is on the western side of the field of the appellant. In other words, the field of the appellant is flanked by the field of the father and the son. Therefore, if one desires to take water from the field of the father to the field of the deceased, then the said water has to pass through the field of the appellant.

8. In order to prove the case against the appellant, the prosecution has examined the following witnesses:

PW 1 Dr.Parimal Jani Exh.8
PW 2 Rudabhai Harijan Exh.11 - eye witness-complainant
PW3 Karsanbhai Ajabhai Exh.21 - eye witness
PW4 Dayabhai Thakaore Exh.22 - eye witness
PW5 Dr.Vikrambhai Exh.23
PW6 Arndabhai Bhagavanbhai Exh.28 panch witness

PW7 Naranbhai Jivabhai Exh.32 eye witness and
father of decd.
PW8 Rameshbhai Patel Exh.33 PSI
PW9 Chandugar Gosai Exh.40 Head Constable
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9. Mr Brahmbhatt took us through the evidence. As per the evidence of PW 1 at Exh.8 and PW 5 at Exh.23, the deceased had suffered two incised wounds on his person. One was found on his head and second was found on his neck. It is not much in dispute that the injuries were sufficient in the ordinary course of nature to cause the death and the cause of death was shock on account of haemorrhage sustained by the deceased on account of the aforesaid injuries. Therefore, the fact of homicidal death was not disputed before the trial court and it was not in dispute before us.

10. So far as oral evidence of the witnesses is concerned, we find that there is consistent evidence of four eye witnesses Rudabhai Exh.11, Dahyabhai Exh.22. Karsanbhai Exh.21 and Naranbhai Jivabhai Exh.32. All of them have given evidence before the trial court that when the deceased was constructing field channel in the field of the appellant, the appellant had dealt dharia blows on the head and neck of the deceased. The said fact is supported by medical evidence referred to hereinabove. Therefore, the evidence of eye witnesses has been supported by medical evidence. There cannot be any dispute about the same. The trial court has also considered that this was a homicidal death and the injuries were caused by the appellant and the said fact in oral evidence has been supported by medical evidence. It is not possible for us to dislodge the said finding of the trial court and Mr Brahmbhatt, learned Advocate was not able to convince us on this point.

11. It is also required to be considered that these four witnesses have consistently given evidence before the trial court. The deceased was attacked by the appellant and two dharia blows were inflicted on the head and neck as aforesaid. These witnesses were cross examined on behalf of the appellant at a very great length. However, the evidence that the blows were inflicted by the appellant on the head and the neck of the deceased could not be shaken. Therefore, the evidence of these four witnesses have not been shaken to any extent and they all stood the test of cross examination. Therefore, the said version on oath before the trial court was accepted by the trial court and even before us it was not possible for Mr Brahmbhatt to say

anything contrary to the finding of the trial court. In fact, Mr Brahmbhatt could not convince us, while arguing that the case has been concocted or fabricated against the present appellants.

12. On the other hand, Mr Brahmbhatt has alternatively argued that looking to the fact that the incident took place all of a sudden in the field of the appellant and looking to the fact that there was some oral exchange of hot words and exchange of filthy language between the deceased and the appellant and looking to the fact that the deceased was holding a spade with him, it can be inferred that the appellant did not intend to commit the murder of the deceased and, therefore, the offence punishable under section 302 of IPC cannot be said to have been made out. On the other hand, Mr Raval has argued that when two blows have been inflicted on the deceased and when the appellant did not sustain a single injury, then in that event, the trial court had considered the said aspect and held that the appellant intentionally caused murder of the deceased. Mr Raval, therefore, argued that the said finding of the trial court may be accepted and upheld by this court.

13. We have considered the arguments of the learned Advocates for the parties. It is true that two blows have been inflicted by the appellant on the head and neck of the deceased. There cannot be any serious dispute about the same. At the same time, it is also required to be considered that the deceased was working in the field of the appellant and he was found there in injured condition after the incident in the field of the appellant and there is no dispute to that aspect at all. Therefore, the deceased had entered the field of the appellant indisputably.

14. Then, it is also a matter of record that the deceased was constructing or reconstructing or renovating field channel. Therefore, it can reasonably be inferred that the deceased possessed a spade with him and field channel could not be constructed or reconstructed or renovated without the help of some instrument. Even it has come on record that the spade was found on the spot after the incident was over. This clearly shows that the deceased possessed a spade at the time when the incident took place. Even the witnesses have not said that the spade belonged to the appellant. The spade has been produced by the father of the deceased also. These facts clearly show that the deceased was holding a spade with him at the time when the incident took place.

15. The witnesses have consistently given evidence before the trial court that there was hot exchange of words and exchange of filthy language between the two i.e. the appellant and the deceased. Now when the deceased was constructing or reconstructing field channel in the field of the appellant, the appellant was naturally annoyed. On the one hand, one would continuously enter his field for reconstructing or renovating field channel and that also in the field of the appellant, on the other hand, that part of the land would be rendered useless and no cultivation would be possible on such a part of land. Even otherwise no farmer would like any stranger to enter his field. Therefore, the appellant appears to have been annoyed by the aforesaid entry of the deceased in his field. It was no a simple bonafide and innocent entry of the deceased on the field of the appellant. The deceased was working on the field channel in the said field. Therefore, there was an additional reason for the appellant to get annoyed against the deceased. It is also required to be considered that the appellant did not attack the deceased as soon as he saw the deceased working on his field channel in the field of the appellant. Even according to the witnesses of the prosecution including the complainant and the father of the deceased, the appellant first asked the deceased to go away from the said place. The appellant also asked the deceased not to construct field channel in his field. This shows that the appellant had given an opportunity to the deceased to quit from the land. After all it was the land of the appellant indisputedly and, therefore, the appellant had a right to remove any person entering in his land.

16. At this stage, Mr Raval, learned APP has argued for the State that the field channel was there since long and therefore, the deceased was simply renovating the same. The prosecution witnesses have not also stated that the field channel was there since long and it was simply being renovated. At the same time, it remains the fact that the deceased was working on the field channel at the relevant point of time and the place was inside the field of the appellant and that fact cannot be disputed even for a moment.

17. So on the one hand, the deceased was working in the field of the appellant and on the other hand, the appellant asked the deceased to go away from the land but the deceased did not pay any heed to the request or command of the appellant and continued to work on the field channel in the field of the appellant. It appears that thereafter there was some sort of exchange of words

and exchange of filthy language between the two. The defence has alleged that the deceased had attacked with spade on the appellant. It is true that there is no evidence about the same. Naturally, the witnesses have come to support the prosecution but they may not support the defence theory during the course of cross examination. It is more so when PW 7-Naranbhai Jivabhai is father of the deceased and even the complainant Rudabhai is a distant relative of the deceased. Therefore, the witnesses may not whole heartedly support the defence theory. At the same time, it is also true that the appellant has not raised any such plea during the course of his further statement recorded under section 313 of the Code.

18. Nevertheless, whenever a defence raises a plea during the course of a trial, it is not always necessary that the defence should raise the said plea positively during the course of his further statement under section 313 of the Code. Even if a particular plea has not been raised by the defence during the course of his further statement under section 313 of the Code, it would be open to the defence to advance an argument that the defence had a right of private defence or that the accused had a right to defend his person or property. For this purpose the accused can certainly show to the Court that from the evidence and circumstances, it is probable that the accused did possess such a right. In the present case also, though the appellant has not positively pleaded that he had a right of private defence and that the deceased had attacked the appellant by means of spade, the defence has advanced an argument to the aforesaid effect. There appears to be an argument on the part of the appellant before the trial court that the deceased did attack the appellant with a spade. In our opinion, it was open to the defence to advance the aforesaid argument before the trial court and it is still open to the appellant to advance such arguments before this court also. We also form an opinion that it would not be necessary for the appellant before this court to have a specific plea either in the further statement or elsewhere for advancing the said argument.

19. In the present case, we find that apart from the fact that the incident took place in the field of the appellant, it is also not in dispute that there were some marks or signs on the land of the appellant at the place where the offence is said to have been committed indicating that there was some scuffle between the appellant and the deceased. The learned APP has shown to us that the area is very small. However, the panchnama

does show that there were some marks or signs indicating that there was some scuffle between the two. This shows that the incident was not limited to oral exchange of words and exchange of filthy language. The said episode of exchange of words was also followed by some scuffle between the two. This may suggest that the deceased might have tried to commit some attack on the appellant by means of spade. Even otherwise, it is not the case of the prosecution that there was an old enmity between the appellant and the deceased. It is also not the case of the prosecution that there was an old enmity between the appellant and the father of the deceased. There is no clear evidence to show that the field channel was there since long and the dispute was also there between the two since long. In this background, the fact remains that the quarrel started on the date of the incident itself. It started on the field of the appellant. The deceased was constructing or reconstructing or renovating field channel in the field of the appellant and there was some oral exchange of words between the two followed by oral exchange of filthy language which was further followed by some scuffle between the two. Ultimately, the appellant must have dealt dharia blows on the deceased.

20. In above view of the matter, we find that the above circumstances do not indicate that the appellant had formulated an intention to kill the present deceased. However, in view of the fact that there was some oral exchange of filthy words and scuffle between the two, the appellant all of a sudden lifted dharia and inflicted two blows on the person of the deceased. It is true that the appellant had inflicted two blows and both were on the vital parts of the body of the deceased. At the same time, looking to the aforesaid background and looking to the previous enmity between the two, it is not possible for us to infer any intention on the part of the appellant to commit murder on the deceased.

21. For this purpose, we may refer to provision of section 304 of IPC. There it has been clearly laid down that whoever commits culpable, homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. The second part of the said section would be attracted if the death is caused with the knowledge that the injury is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

22. We have, therefore, been concentrating on the applicability of section 304 of IPC. Once it is found that though the death has taken place and the circumstances on record indicate that there was no intention on the part of the accused to cause the death of the deceased, then we will have to refer to the provisions of section 304 wherein two parts have been formulated. The first part is of intention to cause death and to cause such bodily injury as is likely to cause death. The second part is knowledge that such injury is likely to cause death. On appreciation of the evidence on record and particularly the aforesaid factual aspects and circumstances on record, we are of the clear opinion that the prosecution has not been able to prove that there was intention on the part of the appellant to commit murder of the deceased which would be an act of offence punishable under section 302 of IPC. Therefore, we are required to consider the applicability of section 304 of IPC. Looking to the aforesaid background referred to above and considering the fact that the incident took place in the field of the appellant, that there was dispute about the existence of right of the field channel, that the appellant requested the deceased to go away from his field, that the deceased did not leave the place and continued to work on field channel, that there was exchange of hot words that there was further exchange of filthy language between the two and it was followed by scuffle between the two, leaving marks and signs on the land itself, it would be reasonable for us to infer that though the appellant did not have any intention to cause murder of the deceased. At least, the appellant would be entitled to the benefit of reasonable doubt in respect of an offence punishable under section 302 of IPC. We are also of the opinion that the appellant did inflict two blows on the head and neck of the deceased by means of dharia and while so doing, he possesses an intention of causing death or causing bodily injuries as were likely to cause death being an act to commit culpable homicide not amounting to murder. In other words, we are of the opinion that the appellant was committed an act of culpable homicide not amounting to murder. However, the act has been committed with an intention to cause death or causing such bodily injury which is likely to cause death. Such an offence would certainly fall within four corners of section 304-I of IPC. In above view of the matter, on reappreciation of evidence on record, with the help of the learned Advocates for the parties and considering the fact that the appellant is in jail since the date of his arrest i.e. from 22.10.1993, it would be just and proper to treat the sentence already undergone

to be adequate. However, we would not like to disturb the order of the trial court imposing a fine of Rs.7000/and directing the appellant to undergo imprisonment for a period of six months, in default of payment of fine. However, we add here that if the fine is realised, then, the amount of fine should be paid to the legal heirs of the deceased.

23. For the foregoing reasons the present appeal is partly allowed. The appellant is ordered to be convicted for an offence punishable under section 304 (1) of IPC instead of under section 302 of IPC. The sentence of imprisonment for life imposed on the appellant is, therefore, modified and the appellant is convicted for the aforesaid offence and is sentenced to suffer R.I. for the period already undergone by him. However, imposition of fine on the appellant stands confirmed and even the sentence in default of payment of fine imposed by the trial court is also confirmed. Therefore, the appellant will have to pay fine or he will have to undergo sentence in default of payment of fine in terms of the order of the trial court. If the fine is realised, then the amount of fine shall be paid to the legal heirs of the deceased. We do not disturb the order regarding disposal of muddamal article.

[D K Trivedi, J.]

[D P Buch, J.]

msp